



FILED
11-07-16
04:59 PM

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of ILATANET, LLC
for Authorization to obtain a Certificate of Public
Convenience and Necessity as a Telephone Corporation
Pursuant to the Provisions of Public Utilities Code
Section 1001.

Application 14-01-029
(Filed January 31, 2014)

**COMMENTS OF ILATANET LLC ON THE PROPOSED DECISION
OF ALJ BURCHAM**

GOODIN, MACBRIDE,
SQUERI & DAY, LLP
Thomas J. MacBride, Jr.
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: tmacbride@goodinmacbride.com

Attorneys for Ilatanet, Inc.

Dated: November 7, 2016

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. COMMENTS ON PROPOSED DECISION.....	3
A. Jurisdiction- Findings of Fact 2 and 8	3
1. Past Intrastate Traffic.....	4
2. Prepaid Calling Service	4
a. The Legislature Did Not Expand the Commission's Authority over Market Entry by Permitting the Commission to Enforce Certain Advertising Rules	5
B. The Commission May Not Impose a Fine on An Entity That Is Not a Public Utility.....	8
C. The Commission may not impose a fine on anyone in a ratesetting proceeding	8
D. The PD's Generic Proscription On Doing Business With Ilatanet Lies Outside the Scope of the.....	10
1. The Proscription Lies Outside the Scoping Memo.....	10
2. The Order is Directed At Entities That Are Not Parties to This Proceeding	10
3. The PD Does Not Address Case Law and Statues Governing Termination of Service By Telecommunications Carriers in California	11
4. The PD Does Not Address the Duty of Carriers to Interconnect under Federal Law	11
III. CONCLUSION	12
APPENDIX-SUMMARY OF PROPOSED CHANGES IN PD.....	13

TABLE OF AUTHORITIES
(continued)

	Page
STATUTES	
Business & Professional Code § 17538.9.....	passim
Public Utilities Code Section 202.....	6
Public Utilities Code Section 701.....	7
Public Utilities Code Section 702.....	5
Public Utilities Code Sections 885	5, 7
Public Utilities Code Section 886.....	5, 7
Public Utilities Code Section 887.....	passim
Public Utilities Code Section 1001.....	6
Public Utilities Code Section 1013.....	6
Public Utilities Code Section 1701.1-1701.3	9
Public Utilities Code Section 1701.1(c)(2).....	9
Public Utilities Code Section 1701.2.....	10
Public Utilities Code Section 1705.....	2
Public Utilities Code Section 1747(a)(2).....	2
Public Utilities Code Section 1757(a)(1).....	1, 2
Public Utilities Code Section 1757(a)(2).....	5
Public Utilities Code Section 1757(a)(3).....	2
Public Utilities Code Section 1801-1807	7
Public Utilities Code Section 1807.....	8
Public Utilities Code Section 2017.....	2, 8
Public Utilities Code Section 2018.....	2, 8
Public Utilities Code Section 2889.9(f).....	11
Public Utilities Code Section 5371.6.....	11
Public Utilities Code Section Section 29047.....	7

TABLE OF AUTHORITIES (continued)

Public Utilities Code Section 100168.....	Page 7
CASES	
<i>AT&T Corp. v. PAB, Inc.</i> , 935 F. Supp 584 (E.D. Pa. 1996).....	3
<i>City of Huntington Beach v. Public Utilities Commission</i> , 214 Cal.App.4th 566; Cal. App. LEXIS 197 (2013)	2, 10
<i>City of Marina v. Board of Trustees of California State University</i> , 39 Cal. 4th 341 (2006).....	5
<i>Consumers Lobby Against Monopolies v. Public Utilities Commission</i> , 25 Cal. 3d 891 (1979).....	7, 9
<i>County of Inyo v. Public Utilities Commission</i> , 26 Cal. 3d 154 (1980).....	7
<i>Crockett Tel. Co. v. FCC</i> , 963 F.2d 1564 (D.C. Cir. 1992).....	3
<i>Edward J. Sokol v. Public Utilities Commission</i> , 65 Cal. 2d 247 (1966).....	2, 11
<i>Foxhall Realty Law Offices, Inc v. Telecom Prem. Service</i> , 156 F.3d 432 (2d Cir. 1998)	3
<i>Ivy Broadcasting v. AT&T Co.</i> , 391 F.2d 486 (2d Cir. 1968)	3
<i>Kaufman v. ACS Systems</i> , 110 Cal. App 4th 886 (2003).....	3
<i>Marvin Goldin v. Public Utilities Commission</i> , 23 Cal. 3d 638 (1979)	2, 11
<i>Monterey Peninsula Water Management District v. Public Utilities Commission</i> , 62 Cal. 4 th 693 (2016)	7
<i>New Orleans Public Service Inc. v. Council of New Orleans</i> , 491 U.S. 350 (1989)	9
<i>Pacific Bell Wireless (“Cingular”) v. Public Utilities Commission</i> , 140 Cal. App. 4th 718 (2006).....	10

TABLE OF AUTHORITIES (continued)

	Page
<i>Pacific Gas and Electric Company v. Public Utilities Commission</i> , 237 Cal.App. 4th at 829 (2015)	9
<i>Pacific Gas and Electric Company v. Public Utilities Commission</i> , 237 Cal.App. 4th 812 (2015)	9, 10
<i>Southern California Edison v. Public Utilities Commission</i> , 140 Cal. App. 4th 1085, Cal. PUC LEXIS 948 (2006)	2, 10
<i>Southern California Gas Company, Pacific Telephone & Telegraph Co. and PG&E v. Public Utilities Commission</i> , 38 Cal. 3d 64, 68 (1985)	8

DECISIONS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

Decision 84-06-113	4
Decision 90-05-009	1, 3
Decision 90-12-051	1, 3
Decision 97-05-089	2
Decision 09-01-017	4
Decision 16-08-025	8

RULES AND REGULATIONS

Article 7	9
Rule 1.1	9
Rule 1.3(a)	9
Rule 7.1(e)(2)	9
Rule 14.3(a)	1
Rule 14.3(c)	3
Rule 17.5	8

OTHER AUTHORITIES

Federal Telecommunications Law Sec. 3.11	11
Federal Telecommunications Law Sec. 5.11.1	11

TABLE OF AUTHORITIES
(continued)

	Page
<i>LDDS Communications, Inc. v. United Telephone of Florida</i> , 15 F.C.C. Rcd. 4950 (2000).....	3
Article 12, Section 5 of California Constitution.....	7
Telecommunications Act of 1996, 47 USCA 251(a).....	11

3614/001/X186339.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of ILATANET, LLC
for Authorization to obtain a Certificate of Public
Convenience and Necessity as a Telephone Corporation
Pursuant to the Provisions of Public Utilities Code
Section 1001.

Application 14-01-029
(Filed January 31, 2014)

**COMMENTS OF ILATANET LLC ON THE PROPOSED DECISION
OF ALJ BURCHAM**

Pursuant to Rule 14.3 (a) of the Commission's Rules of Practice and Procedure ("Rules"), Ilatanet, LLC ("Ilatanet") herein submits its Comments on the Proposed Decision Of ALJ Burcham ("PD"). The PD was mailed on October 18, 2016. Rule 14.3(a) provides that comments on the PD be file within 20 days thereafter, November 7, 2016.

I. INTRODUCTION

The PD denies an application that, for at least two years, no party has asked the Commission to grant. Had the PD simply denied the application, these comments would not be necessary. The PD, however, elects instead to pursue a course of action falling far outside the Commission's jurisdiction, the Scoping Memo or any explanatory framework found in the text of the PD. Accordingly, the PD should be modified so that it is limited to Ordering Paragraphs 1, 2, 6 and 7. Absent such a modification, the PD would never withstand judicial review.

First, the PD does not contest the fact that Ilatanet provides no intrastate¹ service today (and has not for two years). The PD, nonetheless, asserts Commission jurisdiction over

¹ See Public Utilities Code Section 1757(a)(1). "(W)e have held in prior decisions that we have jurisdiction only over intrastate operations consisting of exchange and intrastate toll business. Absent jurisdiction over international calls, the complaint against AT&T and international calls should be dismissed." *Seisay v. Gen. Telephone and AT&T*, D. 90-12-051, p. 5 (Dec. 19, 1990). *See also George Sing Louie v. Pacific Telephone & Telegraph Co.*, D. 90-05-009, Conclusion of Law 3 (May 4, 1990)
(footnote continued)

Ilatanet, today, based on a provision of the Business & Professions Code that (1) establishes marketing standards no one claims Ilatanet violated (2) doesn't require anyone to seek a "certificate of public convenience and necessity"² and (3) is never mentioned in the Scoping Memo.³

Next, the PD directs "all telecommunications service providers in California" (none of which were parties to this docket or even on the service list) to abrogate any contractual or other business relationship with Ilatanet. The PD does not, however, provide a single finding⁴ legal conclusion, citation of precedent⁵ or even a single sentence of analysis in support of the lawfulness or propriety of such an order, one lying well beyond the four corners of the Scoping Memo.⁶

Third, after denying Ilatanet's application to become a public utility, the PD then imposes a fine on Ilatanet pursuant to provisions of the Public Utilities Code that only govern the imposition of fines on public utilities.⁷ The PD does not explain why the Commission may rely on those statutes to fine an entity that is not a public utility nor does it explain why an entity that is not a public utility would be required to comply with such an order.

("The complaint should be dismissed as to International for lack of jurisdiction.").

² Section 887 and Business & Professions Code § 17538.9 provide the apparent, but inexplicable, basis for the PD's finding that "Ilatanet provides a service for which a certificate of public convenience and necessity is required." Finding of Fact ("FOF") 8. Neither statute requires any entity to seek a certificate of public convenience and necessity.

³ Section 887 of the Public Utilities Code provides that "the commission may enforce the standards and requirements of Section 17538.9 of the Business and Professions Code. No one has alleged that Ilatanet did not comply with "the standards and requirements of Section 17538.9 of the Business and Professions Code." The Scoping Memo makes no reference to Section 17538.9 of the Business and Professions Code.

⁴ Section Nos. 1705, 1757(a)(3). All statutory references here in are to the California Public Utilities Code unless otherwise indicated.

⁵ The PD does not for example address the procedural requirements addressed in *Marvin Goldin v. Public Utilities Commission* 23 Cal. 3d 638 (1979) or *Edward J. Sokol v. Public Utilities Commission*, 65 Cal. 2d 247 (1966). Nor does it address the jurisdictional limitations attendant to any such order. See *Communication Telesystems International*, D. 97-05-089, p. 61 n. 13 (May 21, 1997) ("In response to concerns raised by Pacific Bell to CTS, we also clarify that this decision does not affect the LECs' authority to provide billing and collection services for interstate and international calls, but prohibits them from providing such services for intrastate calls.").

⁶ Section 1747(a)(2). *City of Huntington Beach v. Public Utilities Commission* 214 Cal.App.4th 566; 2013 Cal. App. LEXIS 197 (March 14, 2013); *Southern California Edison v Public Utilities Commission*, 140 Cal. App. 4th 1085, 2006 Cal. PUC LEXIS 948 (June 26, 2006)

⁷ See, Sections 1757(a)(1), 2017 and 2018.

Finally, the imposition of the fine (a judicial act) takes place in a ratesetting proceeding in a docket, a CPCN application, seeking permissive authority. The PD does not explain how the Commission may do so.

The PD is unsustainable as a legal matter and should be withdrawn or modified as recommended herein. The application should simply be dismissed or denied. As directed by Rule 14.3(c), Ilatanet will “focus on factual, legal or technical errors in the proposed... decision and...shall make specific references to the record or applicable law.”

II. COMMENTS ON PROPOSED DECISION

A. Jurisdiction- Findings of Fact 2 and 8

The PD finds that “Ilatanet, LLC is a prepaid calling service as defined in Business & Professions Code § 17538.9 and is subject to the Commission’s jurisdiction under Public Utilities Code § 887.”⁸ Accordingly, the PD goes on to find that “Ilatanet provides a service for which a certificate of public convenience and necessity is required.”⁹

The PD does not contest, nor could it, that for at least the last two years Ilatanet has not carried any California intrastate traffic.¹⁰ The PD is also utterly devoid of any analysis of the decades of jurisprudence limiting the jurisdiction of the Commission to intrastate telecommunications.¹¹ The PD does not assert, nor could it, that Ilatanet employs calling cards. Accordingly, the PD seems to base its claim of current authority over Ilatanet on either (1) the past carriage of a very minimal level of intrastate traffic or (2) the fact that “Ilatanet *provides*

⁸ Finding of Fact (“FOF”) No. 2

⁹ FOF No. 8.

¹⁰ PD, page 6.

¹¹ *Ivy Broadcasting v. AT&T Co.* (2d Cir. 1968) 391 F.2d 486, 490; *AT&T Corp. v. PAB, Inc.* (E.D. Pa. 1996) 935 F. Supp 584, 590; *LDDS Communications, Inc. v. United Telephone of Florida*, 15 F.C.C. Rcd. 4950, P 2 (2000) [2000 FCC LEXIS 1181]. *Kaufman v. ACS Systems* (2003) 110 Cal. App 4th 886, 896 (quoting *Foxhall Realty Law Offices, Inc v. Telecom Prem. Service* (2d Cir. 1998) 156 F.3d 432, 437). *Crockett Tel. Co. v. FCC* (D.C. Cir. 1992) 963 F.2d 1564, 1566. *Seisay v. Gen. Telephone and AT&T*, D. 90-12-051, p. 5 (Dec. 19, 1990). ““(W)e have held in prior decisions that we have jurisdiction only over intrastate operations consisting of exchange and intrastate toll business. Absent jurisdiction over international calls, the complaint against AT&T and international calls should be dismissed.” *See also George Sing Louie v. Pacific Telephone & Telegraph Co.*, D. 90-05-009, Conclusion of Law 3 (May 4, 1990) (“The complaint should be dismissed as to International for lack of jurisdiction.”). The lone exception to the string of Commission jurisprudence is the *Skynet* decision D.09-01-017 which is

(footnote continued)

[present tense] a service for which a certificate of public convenience and necessity is required”¹²presumptively “a prepaid calling service as defined in Business & Professions Code § 17538.9.”¹³We turn to both possible claims below.

1. Past Intrastate Traffic

Prior to September of 2014, Ilatanet carried a very small amount of intrastate traffic,¹⁴a level falling well below the “holding out” standard set in *In Competition in the Provision of Telecommunications Transmission Services* D.84-06-113, 15 CPUC 2d 426, 465-466.¹⁵ The PD may intend to tacitly overrule the Commission’s comprehensive 1984 decision and find that Ilatanet’s \$2-3/day of intrastate service violated section 1001. Even if it does, it not explain why the Commission is vested with jurisdiction over Ilatanet today because Ilatanet provided miniscule levels of intrastate service two years ago.

Indeed, it is not at all clear whether the PD is making such a claim. If it is, the PD does not state why past (but ceased) activity subjects a person or corporation to current Commission jurisdiction such that the person or corporation would be required to comply with a Commission order as a public utility.¹⁶

2. Prepaid Calling Service

It is more likely that the PD is resting its jurisdictional claim on its finding that (1) Ilatanet today provides “prepaid calling service” as defined in Business & Professions Code § 17538.9, and (2) Section 887 authorizes the commission to “enforce the standards and requirements of Section 17538.9 of the Business and Professions Code.” The PD concludes that, accordingly, “Ilatanet, LLC is a prepaid calling service as defined in Business & Professions Code § 17538.9 and is subject to the Commission’s jurisdiction under Public Utilities Code §

addressed at page 19-25 of Ilatanet’s Opening Brief. The PD does not rely on *Skynet* or address it at all.

¹² FOF No. 8.

¹³ FOF 2.

¹⁴ PD, p. 10.

¹⁵ “Intrastate telecommunications traffic carried over facilities as an incidence to lawfully provided interstate services are encompassed within interstate operating authorities and may not be prohibited by this Commission.” Id. at p. 475 (emphasis added)

¹⁶ Section 702.

887.”¹⁷ The apparent rationale is that even though no one has accused Ilatanet of violating Section 17538.9 of the Business and Professions Code, someone might do so someday and therefore Ilatanet is required to obtain operating authority from the Commission [“a certificate of public convenience and necessity is required”¹⁸] even though (1) Ilatanet offers no intrastate service and (2) no statute requires a provider of “prepaid calling service” *per se* to obtain a certificate or license from the Commission.¹⁹

The PD’s construction of the effect of Section 887 of the Public Utilities Code and Section 17538.9 of the Business and Professions Code is completely misplaced. A service subject to advertising standards the Commission “may enforce” is not *per se* “a service for which a certificate of public convenience and necessity is required”²⁰ That rhetorical leap, if taken by the Commission, would constitute a failure to proceed in the manner required by law.²¹

- a. The Legislature Did Not Expand the Commission’s Authority over Market Entry by Permitting the Commission to Enforce Certain Advertising Rules.

At the outset, when the Legislature enacted Section 887, it did not amend Sections 885 and 886. The reach of Section 885-886 remains limited to pre-paid calling cards. The PD does not, nor could it, assert that Ilatanet’s service is that of a “prepaid calling card.”²²

Indeed, when the Legislature enacted Section 887, it did not extend the Commissions control over market entry (Sections 885,886, 1001,1013) one iota beyond that in

¹⁷ Finding of Fact (“FOF”) No. 2

¹⁸ FOF No. 8.

¹⁹ Obviously a provider of “prepaid calling service” offering intrastate service would be required to obtain Commission authority but that requirement arises out the provision of intrastate service in California, not because the company provides “prepaid calling service”

²⁰ FOF No. 8.

²¹ See, Section 1757(a)(2). “(A)n agency’s use of an erroneous legal standard constitutes a failure to proceed in a manner required by law.” *City of Marina v. Board of Trustees of California State University*, 39 Cal. 4th 341, 355 (Cal. 2006).

²² Notwithstanding the confusion at the outset of this docket over whether Ilatanet employed cards- confusion for which Ilatanet must accept some responsibility-, there has never been any evidence that anyone in California employed a card to make calls over Ilatanet’s service. It is safe to assume that if Ilatanet cards were being sold in California, SED would have produced such a card long ago. Accordingly, Ilatanet presumes that the Denial Ruling’s claim of Commission jurisdiction over Ilatanet rests on an assumption that Ilatanet’s service falls within the definition of “Prepaid calling services” found in Bus. & Prof. Code § 17538.9.

existence at the time Section 887 was enacted. By its terms, Bus. & Prof. Code § 17538.9 (“B&P 17538.9”) does not require a provider of “prepaid calling services” to obtain Commission authority in order to provide service. One might debate whether the Legislature could constitutionally subject international and interstate service to specific marketing standards such as those set forth in B&P 17538.9. It is beyond debate, however, that the Legislature, by enacting Section 887, did not vest the Commission with any additional authority over entry to the market. The statute does not address entry to the market at all. The Legislature did not, as the PD suggests, provide that a service required to meet advertising standards set forth in B&P 17538.9 is “a service for which a certificate of public convenience and necessity is required.”²³

As the legislative history of section 887 shows, the Legislature simply intended to ensure that the Commission had the authority to enforce Bus. & Prof. Code § 17538.9 in its own forum (as the Commission it would when enforcing provisions of the Public Utilities Code) with respect to providers of intrastate service already subject to its jurisdiction,²⁴ e.g. “calling card companies”.

Had the Legislature intended to attempt to extend the Commission’s jurisdiction to interstate or international service (which it did not), it would have (as it was required) to “specifically so state...”²⁵ It would be a matter of some moment were the Legislature to attempt to expand the Commission jurisdiction to interstate and international telecommunications notwithstanding 80 years of preemption jurisprudence to the contrary. Any suggestion that the Legislature sought to do so by implication is at odds with Court decisions detailing the requisite expression of Legislative intent to abrogate traditional limitations on the Commission’s

²³ FOF No. 8.

²⁴ See April 14, 2008 analysis of the Assembly Committee on Utilities and Commerce of AB 2885 (De La Torre):

*The PUC does have authority to open its own investigation and issues fines against registered pre-paid calling card companies if the companies violate broad PUC provisions against deceptive advertising. However, they may not have any legal authority to directly enforce violations of the Business and Professions Code. **If the PUC were to open a proceeding and develop their own rules governing the disclosure of rates they would be able to directly pursue violations of their rules instead of taking parties to court.** (italics and emphasis added).*

²⁵ Section 202.

authority.²⁶

Moreover, Section 17538.9 defines “prepaid calling cards” and “pre-paid calling service” separately.²⁷ Section 17538.9 does not transform a pre-paid calling service into a calling card service subject to PU Code Sections 885-886.” Had such been the Legislature’s intent, it would have amended Section 885-886 when it enacted Section 887. It did not.

In sum, if Ilatanet was not required to obtain Commission authority to operate prior to the enactment of section 887 (which it was not), Ilatanet was not required to do so as a result of the enactment of Section 887. Construing Section B&P 17538.9 in a manner that confers broad authority over prepaid calling services is sharply at odds with other provisions of the Public Utilities Code that (1) vest the Commission with limited jurisdiction over some aspect of an entity’s operations but (2) have never been construed to require such entities to seek Commission authority to operate in California²⁸. Put another way, when the Legislature, acting pursuant to Section 5 of Article 12 of State Constitution²⁹, has conferred some specific authority on the Commission, the authority is limited to that expressly provided.³⁰

²⁶ *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016) 62 Cal. 4th 693 (Jan. 25, 2016) [2016 Cal. LEXIS 45]. *County of Inyo v. Public Utilities Commission*, 26 Cal. 3d 154 (1980)

²⁷ (5) “Prepaid calling card” or “card” means any object containing an access number and authorization code that enables a consumer to use prepaid calling services. It does not include any object of that type used for promotional purposes.

(6) “Prepaid calling services” or “services” refers to any prepaid telecommunications service that allows consumers to originate calls through an access number and authorization code, whether manually or electronically dialed.

²⁸ See, Sections 29047 (Bay Area Rapid Transit District), PU 30646: (Southern California Rapid Transit District) Section 100168 (Santa Clara Valley Transportation Authority). “The district shall be subject to regulations of the Public Utilities Commission relating to safety appliances and procedures... *The commission shall enforce the provisions of this section.*”

²⁹ Section 5 of Article 12 provided the Legislature with the authority to enact the statutes cited in footnote 28 *supra*.

³⁰ See, for example, Section 1801-1807 which authorize and direct the Commission to make awards of intervenor compensation otherwise lying beyond the Commission’s jurisdiction per *Consumers Lobby Against Monopolies v. Public Utilities Commission* 25 Cal. 3d 891 (1979). Shortly after the Legislature enacted Section 1801-1807, the California Supreme Court was asked to address whether Section 701 enlarged the scope of the Commission’s authority beyond that set forth in the intervenor compensation statute, the Court was quick to respond by stating that “(t)he Legislature, by adopting explicit, limited fee

(footnote continued)

The comments provided above with respect to Findings of Fact Nos. 2 and 8 apply with equal force to Finding of Fact No. 9. The Commission cannot find that “Ilatanet is operating without authority contrary to state law” because the enactment Section 887 does provide that “prepaid calling services” is “a service for which a certificate of public convenience and necessity is required...” There is simply nothing in Section 887, Section B&P 17538.9 or any other statute that so provides.

Findings of Fact Nos. 2, 8 and 9 have no basis in law and should be stricken.

B. The Commission May Not Impose a Fine on An Entity That Is Not a Public Utility.

The Commission may not lawfully impose a fine on Ilatanet in this proceeding because Ilatanet is not a public utility. While one might argue that B&P 17538.9 permits the Commission to impose a fine for a violation of B&P 17538.9, (1) the PD does not so argue, (2) no one has asserted that Ilatanet violated B&P 17538.9, (3) the Commission has conducted no proceeding to determine if Ilatanet violated B&P 17538.9 and (4) the Scoping Memo in this proceeding does not ask whether Ilatanet violated B&P 17538.9.

More fundamentally, Section 2107³¹ governs the level of a fine that may be imposed on a public utility. Ilatanet is not a public utility. It has not been certified by the Commission as a public utility nor does it seek to be so certified. An applicant for Commission authority does not become a public utility merely by filing an application.³²

C. The Commission may not impose a fine on anyone in a ratesetting proceeding.

The Commission may not impose a fine in a ratesetting proceeding. The

rules for the period beginning January 1, 1985, has foreclosed the notion that an additional implied authority also exists.” *Southern California Gas Company, Pacific Telephone & Telegraph Co. and PG&E v. Public Utilities Commission.*, 38 Cal. 3d 64, 68 (1985). The Court also dispelled any notion that the California Constitution authorized the Commission to act out of concert with Sections 1801-1807. *Id*

³¹ The Scoping Memo also makes reference to Section 2018 which contains no substantive authority to impose fines but only contains provisions regarding continuing offenses.

³² It is for this reason that the Commission adopted new Rule 17.5. to provide for the payment of intervenor compensation by unsuccessful CPCN applicants notwithstanding the fact that Section 1807 provides that such payments are to be made by “public utilities”. See Decision 16-08-025.

imposition of a fine is a judicial act, an exercise of the Commission's limited judicial powers.³³ Because Application 14-01-029 sought operating authority, this proceeding was correctly categorized as ratesetting rather than quasi-judicial.³⁴ Ratesetting is inherently a legislative act.³⁵ While the Commission categorizes many matters that do not involve the formal setting of rates as "ratesetting"³⁶, assertions of violations of law or Commission orders are clearly relegated to "adjudicatory" proceedings pursuant to Rule 1.3(a).

If, as the PD suggests, the Commission seeks to "enforce" B&P 17538.9 (even though no one has asserted that Ilatanet violated B&P 17538.9) or any other law, it would be required to do so in a separate enforcement proceeding, classified by law as an "adjudication."³⁷ The imposition of a fine is an "enforcement power" whether it relates to Rule 1.1 or a provision of the Public Utilities Code. ("The Legislature has also provided the PUC with extensive enforcement powers, including the imposition of monetary civil penalties."³⁸). Enforcement proceedings are statutorily classified as "adjudicatory;"³⁹ ("[a] case where the Commission considers imposing monetary penalties is an adjudicatory matter."⁴⁰).

Ilatanet recognizes that the Commission has imposed fines in proceedings that were initially categorized as "ratesetting." Generally, but not always, the imposition of the fine arises out of a settlement in which the applicant agrees to pay the fine as a condition of receiving operating authority; here the parties did not reach a settlement. In other instances, the Commission has simply opened a second phase of the proceeding and categorized the second phase as "adjudicatory."⁴¹

³³ See *Consumers Lobby Against Monopolies ("CLAM") v. Public Utilities Commission* (1979) 25 Cal. 3d 891, 907-909.

³⁴ See Sections 1701.1-1701.3 and Article 7 of the Commission's Rules of Practice and Procedure ("Rules").

³⁵ "Ratemaking is an essentially legislative act . . ." *New Orleans Public Service Inc. v. Council of New Orleans* (1989) 491 U.S. 350.

³⁶ Rule 7.1(e)(2).

³⁷ Section 1701.1(c)(2).

³⁸ *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) 237 Cal.App. 4th 812.

³⁹ Section 1701.1(c)(2).

⁴⁰ *Pacific Gas and Electric Company*, 237 Cal.App. 4th at 829, fn. 9.

⁴¹ See Amended Scoping Memo in A. 11-04-013, available at: <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M068/K707/68707807.PDF>.

The only two appellate court decisions upholding the imposition of fines by the Commission were with respect to adjudicatory proceedings.⁴² A Commission order that imposes a penalty in other than an “adjudication case”⁴³ is unlikely to survive court review.

D. The PD’s Generic Proscription On Doing Business With Ilatanet Lies Outside the Scope of the Proceeding

At page 19, the PD states that, “(a)ny telecommunications company operating within California which provides any unauthorized services to Ilatanet should be required to cease doing so.” Conclusion on Law No. 5 and Ordering Paragraph 5 expands the proscription from “unauthorized services” to “any services”. There are myriad reasons why Ordering Paragraph 5 must be deleted.

1. The Proscription Lies Outside the Scoping Memo.

The parties have never briefed the lawfulness of an order such as that embraced in Ordering Paragraph 5. The reason the parties have not done so is that the propriety or wisdom of issuing such an order was never included as an issue in the Scoping Memo. Accordingly it may not be added as an issue and resolved now.⁴⁴

2. The Order is Directed At Entities That Are Not Parties to This Proceeding

The order is directed at “(a)ll telecommunications service providers in California”, none of which are parties to this proceeding or even on the service list. Without any notice at all or an opportunity to be heard, each is directed to “cease providing any services to Ilatanet, LLC.” The order apparently embraces carrier and non-carrier services (such as simple business service) and does not distinguish between intrastate, interstate or international service. It apparently requires “(a)ll telecommunications service providers in California” to breach any contracts they may have for the provision of service to Ilatanet. Nothing in the PD cites any authority for the issuance of such an order. While a substantial body of law surrounding the

⁴² See *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) 237 Cal.App. 4th 812; *Pacific Bell Wireless (“Cingular”) v. Public Utilities Commission* (2006) 140 Cal. App. 4th 718.

⁴³ Section 1701.2.

⁴⁴ *City of Huntington Beach v. Public Utilities Commission* 214 Cal.App.4th 566; 2013 Cal. App. LEXIS 197 (March 14, 2013); *Southern California Edison v Public Utilities Commission* , 140 Cal. App. 4th 1085, 2006 Cal. PUC LEXIS 948 (June 26, 2006)

(footnote continued)

termination of service by “telecommunications service providers in California” exists, none is addressed in the PD.

3. The PD Does Not Address Case Law and Statutes Governing Termination of Service By Telecommunications Carriers in California

Termination of service by a telecommunications carrier for reasons other than non-payment of tariff charges is (1) authorized only in limited instances and (2) subject to strict procedures.

The California Supreme Court has developed rules for termination of intrastate service through its decisions and those rules have been adopted in tariff provisions of certain local exchange carriers;⁴⁵ The PD does not state how Ordering Paragraph 5 complies with these rules nor addresses them at all. Provisions in the Public Utilities Code authorizing the Commission to direct the termination of telecommunications service are rare⁴⁶ and the PD identifies none that authorize Ordering Paragraph 5.

4. The PD Does Not Address the Duty of Carriers to Interconnect under Federal Law

The PD Does Not Address the Duty of Carriers to Interconnect under the Telecommunications Act of 1996, 47 USCA 251(a). The PD does not explain how a carrier could refuse to interconnect with Iltanet. “The duties of 251(a) apply to all telecommunications carriers...”⁴⁷ Again, the reason the parties have not briefed this question is that the propriety or wisdom of issuing an order such as Ordering Paragraph 5 was never included as an issue in the Scoping Memo.

⁴⁵ See, *Marvin Goldin v. Public Utilities Commission* 23 Cal. 3d 638 (1979) or *Edward J. Sokol v. Public Utilities Commission*, 65 Cal. 2d 247 (1966).

⁴⁶ See e.g. Sections 2889.9(f), 5371.6,

⁴⁷ Huber, Kellogg, Thorne, *Federal Telecommunications Law* Sec. 5.11.1. See also, Sec. 3.11.

III. CONCLUSION

The PD should be modified as set forth in the attached Appendix.

Respectfully submitted November 7, 2016 at San Francisco, California.

GOODIN, MACBRIDE,
SQUERI & DAY, LLP
Thomas J. MacBride, Jr.
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: tmacbride@goodinmacbride.com

By /s/ Thomas J. MacBride, Jr.
Thomas J. MacBride, Jr.

Attorneys for Ilatanet, LLC

APPENDIX-SUMMARY OF PROPOSED CHANGES IN PD

Findings of Fact Nos 28 and 9 should be deleted.

BASIS FOR DELETION: As set forth at pp 3-2, *supra.*, Ilatanet is not currently providing any service for which Commission authority is required. The extent to which Section 887 permits the Commission to “enforce” B&P 17538.9 does not reach market entry and the PD does not find that Ilatanet violated B&P 17538.9.

~~2. Ilatanet, LLC is a prepaid calling service as defined in Business & Professions Code § 17538.9 and is subject to the Commission’s jurisdiction under Public Utilities Code § 887.~~

~~8. Ilatanet provides a service for which a certificate of public convenience and necessity is required.~~

~~9. Ilatanet is operating without authority contrary to state law and Commission rules and regulations.~~

Finding of Fact No 11 and Conclusion of Law No 4 should be deleted.

BASIS FOR DELETION: As set forth at pp 8-10, *supra.*, the Commission may not fine Ilatanet because it is not a public utility. Moreover, the Commission may not impose a fine in a non-adjudicatory matter.

~~11. A fine of \$228,000 based on \$500 per day for operating without authority, along with requiring Ilatanet to cease operations in California, is a significant and appropriate penalty.~~

Conclusions of Law

~~4. Ilatanet should be subject to a fine of \$228,000 under §§ 2107 and 2108 for operating without authority prior to filing its application.~~

Conclusions of Law Nos. 5 and 6 should be deleted.

BASIS FOR DELETION: As set forth at pp 10-11, *supra.*, myriad reasons proscribed the Commission from issuing a blanket previously un-noticed order directing carriers to terminate service to Ilatanet. Moreover, the Commission lacks the jurisdiction to prohibit Ilatanet from providing interstate and international service. The Commission may not direct carrier fine Ilatanet because it is not a public utility. Moreover, the Commission may not impose a fine in a non-adjudicatory matter.

- ~~5. All telecommunications service providers in California should be directed to cease providing any services to Iltanet.~~
- ~~6. Iltanet should be required to cease and desist providing all telecommunications services in California.~~

With the corrections set forth above, the order would be limited to the following:

ORDER

IT IS ORDERED that:

1. The motion of Iltanet, LLC, to withdraw its application is denied.
2. The application of Iltanet, LLC, for a Certificate of Public Convenience and Necessity to operate as a non-dominant interexchange carrier in California pursuant to § 1001 is denied.
3. ~~Iltanet, LLC, must pay a fine of \$228,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, California 94102, within 30 days of the effective date of this order. Write on the face of the check or money order "For deposit to the General Fund per Decision [INSERT FINAL DECISION #]."~~
4. ~~Iltanet, LLC, shall immediately cease and desist providing any unauthorized services in California.~~
5. ~~All telecommunications service providers in California shall cease providing any services to Iltanet, LLC.~~
6. If Iltanet, LLC, applies for operating authority in California to provide any form of telecommunications service in the future, it shall include a reference to this Decision in its application.
7. Application 14-01-029 is closed.